

## COMBAT EXCLUSION POLICIES: UNEQUAL PROTECTION UNDER THE LAW

BY

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# **PROPERTY OF U.S. ARMY**

USAWC STRATEGY RESEARCH PROJECT

## **COMBAT EXCLUSION POLICIES: UNEQUAL PROTECTION UNDER THE LAW**

by

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## **ABSTRACT**

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Women have been fighting and dying for the United States since the nation was founded. Yet, women are still precluded from serving in certain military specialties, positions, and units based solely upon their gender. This paper explores the history of women in the military, as well as the history of the current combat exclusion policies. The paper then discusses the constitutionality of the current policies, and it ultimately concludes that the current policies will probably not withstand judicial scrutiny if they are challenged because they likely violate the Due Process Clause of the Fifth Amendment. Finally, the paper advocates the rescission of the current policies and discusses the steps military leaders will need to take to implement a new gender-neutral assignment policy.

## COMBAT EXCLUSION POLICIES: UNEQUAL PROTECTION UNDER THE LAW

[I]t is essential that there be maintained in the Armed Services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense.

—President Harry S. Truman<sup>1</sup>

Women have been fighting and dying for the United States since the nation was founded. Yet, women are still precluded from serving in certain military specialties, positions, and units based solely upon their gender. For example, the current Department of Defense policy excludes women “from assignment to units below the brigade level whose primary mission is to engage in direct [ground] combat.”<sup>2</sup> Similarly, the current Army policy precludes women from serving “in those specialties, positions, or units (battalion size or smaller) which are assigned a routine mission to engage in direct combat, or which collocate routinely with units assigned a direct combat mission.”<sup>3</sup>

The problem, of course, is that the world has changed dramatically since these two policies took effect. We no longer fight exclusively—or even predominantly—on the type of linear battlefield contemplated by these policies. Today, we fight in a fluid environment where women often find themselves engaging the enemy with individual or crew served weapons, while being exposed to hostile fire and direct physical contact with enemy personnel. Moreover, the Army's recent modularization has resulted in women being assigned to positions or units that collocate routinely with units whose doctrinal mission is to engage in direct combat on a regular basis. Finally, and perhaps most importantly, the current combat exclusion policies are likely unconstitutional. As a result, the time has come to rescind the current policies and permit women to serve in

military specialties, positions, and units based upon their physical capabilities, rather than their gender.

This paper will explore the history of women in the military, as well as the history of the current combat exclusion policies. The paper will then discuss the constitutionality of the current policies. Finally, the paper will advocate the rescission of the current policies and discuss the steps military leaders will need to take to implement a new gender-neutral assignment policy.

### The History of Women in the Military

*The Revolutionary War to the Persian Gulf War.* The status of women in the military, like the status of women in American society, has evolved incrementally—and often haphazardly—over time. Women have served in combat since the Revolutionary War, but they were not allowed to serve in the military officially until 1901;<sup>4</sup> they were not afforded equal pay or the same benefits as their male counterparts until 1943;<sup>5</sup> they were not eligible for permanent promotion above the grade of lieutenant colonel or commander until 1967;<sup>6</sup> they were not permitted to attend a military service academy until 1975;<sup>7</sup> they were not permitted to fly combat aircraft until 1991;<sup>8</sup> and they were not permitted to serve aboard combat vessels until 1993.<sup>9</sup>

Prior to 1901, women often provided support services to the military as contractors or volunteers. They also fought alongside men on occasion out of either necessity or desire. During the Revolutionary War, it was common for women to accompany their husbands, sons, and fathers to war as camp followers.<sup>10</sup> Many of these women served as cooks, seamstresses, launderers, and nurses in exchange for rations or a small salary;<sup>11</sup> however, some participated in direct ground combat when

their husbands were incapacitated or killed,<sup>12</sup> and a few disguised themselves as men to fight for their fledgling country.<sup>13</sup>

Women continued to serve in similar roles during the Civil War, but they served in much larger numbers.<sup>14</sup> Several thousand women served as nurses in military hospitals;<sup>15</sup> approximately 400 women disguised themselves as men to fight;<sup>16</sup> and many others served as spies, saboteurs, scouts, and couriers.<sup>17</sup> Even so, it was not until after the Spanish-American War that the Department of War finally acknowledged the need for women to serve in the military in an official capacity.<sup>18</sup>

The establishment of the Army Nurse Corps Auxiliary in 1901 and the Navy Nurse Corps Auxiliary in 1908 marked the first of several watershed moments for women in the military during the 20<sup>th</sup> century.<sup>19</sup> The next such moment occurred in 1917 when the Department of the Navy used a loophole in the law to begin enlisting women as “yeomen (F)” to serve as clerks, draftsmen, translators, and recruiters.<sup>20</sup> Sadly, for every step that women in the military took forward during the first half of the 20<sup>th</sup> century, they took at least a half step back. The Navy and the Marine Corps, for example, discharged the women they had enlisted as soon as World War I ended, and Congress then closed the loophole that had permitted their enlistment in the first place.<sup>21</sup>

World War II was another watershed moment for women in the military. Prior to 1941, there was significant resistance to attempts to expand the role of women in the military. The War Department rejected plans drafted in 1926 and 1928 to create a trained women’s service corps.<sup>22</sup> Fortunately, resistance to such plans within the War Department began to dissipate as the threat of war loomed, and it disappeared almost



completely following the Japanese attack on Pearl Harbor,<sup>23</sup> but Congress was another matter. Opposition was fierce—particularly in the House of Representatives.<sup>24</sup>

Nevertheless, Congress finally established the Women's Army Auxiliary Corps in May 1942,<sup>25</sup> the Women Accepted for Emergency Volunteer Services in July 1942,<sup>26</sup> and the Women's Army Corps (WACs) in July 1943.<sup>27</sup> Women were thus permitted to serve in the military in large numbers in specialties other than nursing for the first time in the history of the United States, even though they served subject to significant restrictions.<sup>28</sup>

Following World War II, some believed that the role of women in the military should be diminished, but Congress could not put the genie back in the bottle. Over 350,000 women had served with distinction in World War II,<sup>29</sup> and several senior leaders and officers in the new Department of Defense supported making women a permanent part of the military.<sup>30</sup> Consequently, Congress finally bowed to the inevitable and reluctantly passed the Women's Armed Forces Integration Act of 1948.<sup>31</sup> Once again, however, Congress placed significant restrictions on the ability of women to serve in the military, to include express prohibitions against the assignment of women to duty in combat aircraft and on Navy vessels other than hospital ships and naval transports.<sup>32</sup>

Over the next three decades, women continued to serve in the military in both war and peace.<sup>33</sup> Yet, restrictions on the number and grade of women serving in the military continued until 1967,<sup>34</sup> and women in the Army remained segregated in the WACs until 1978, when they were finally integrated into the Regular Army.<sup>35</sup>

The final watershed moment for women in the military during the 20<sup>th</sup> century occurred in 1991 when women deployed in support of Operations Desert Shield and Desert Storm. Women had deployed to combat zones prior to 1991, but they had done

so in relatively small numbers.<sup>36</sup> In contrast, women deployed in unprecedented numbers to the Persian Gulf, where they performed a myriad of duties and were exposed to austere conditions and hostile fire on a regular basis.<sup>37</sup>

*Post-Gulf War Studies.* Several studies were conducted regarding women in the military in the aftermath of Operations Desert Shield and Desert Storm. In November 1992, for example, the Presidential Commission on the Assignment of Women in the Armed Forces submitted a Congressionally-mandated report on women in combat.<sup>38</sup> Unfortunately, it appears that the Commission was somewhat dysfunctional, and that several of its members were pushing their own agenda.<sup>39</sup> Consequently, the objectivity of some of the Commission's findings and recommendations are questionable. Nevertheless, the Commission did fulfill its mandate to submit a report that included recommendations on the following matters:

- (A) Whether existing law and policies restricting the assignment of female service members should be retained, modified, or repealed.
- (B) What roles female service members should have in combat.
- (C) What transition process is appropriate if female service members are to be given the opportunity to be assigned to combat positions in the Armed Forces.
- (D) Whether special conditions and different standards should apply to females than apply to males performing similar roles in the Armed Forces.<sup>40</sup>

The Commission made several recommendations regarding Congress' final question, to include recommendations that the Services adopt gender-neutral assignment policies that permit qualified service members to be assigned involuntarily to any position that is open to them;<sup>41</sup> retain gender-specific physical fitness tests and standards;<sup>42</sup> and adopt gender-neutral requirements for specialties for which muscular

strength/endurance and cardiovascular capacity are relevant.<sup>43</sup> Additionally, the Commission made several recommendations regarding Congress' first two questions. First, the Commission found that military readiness should drive assignment policies and "there are circumstances under which women might be assigned to combat positions."<sup>44</sup> Unfortunately, while the Commission recommended repealing the prohibition against assigning women to duty on most combat vessels,<sup>45</sup> the Commission inexplicably recommended reinstating the prohibition against assigning women to duty in aircraft engaged in combat missions that Congress had repealed in 1991.<sup>46</sup> Furthermore, the Commission recommended retaining and codifying the policies prohibiting the assignment of women to direct ground combat units and positions;<sup>47</sup> retaining the existing policies prohibiting the assignment of women to Special Operations Forces;<sup>48</sup> and retaining the Department of Defense's "risk rule,"<sup>49</sup> which stated that "[r]isks of direct combat, exposure to hostile fire, or capture are proper criteria for closing non-combat positions or units to women, when the type, degree, and duration of such risks are equal to or greater than the combat units with which they are normally associated...."<sup>50</sup>

Several months later, in July 1993, the United States General Accounting Office (GAO)<sup>51</sup> issued a report entitled "Women in the Military: Deployment in the Persian Gulf War."<sup>52</sup> This report found that the majority of the study participants viewed women's duty performance during the Persian Gulf War to be as good as or better than men's;<sup>53</sup> units used teamwork effectively to overcome individual strength limitations;<sup>54</sup> some men felt a need to protect women;<sup>55</sup> men and women endured the same austere encampment facilities and conditions;<sup>56</sup> women's health and hygiene issues did not

have a significant impact on mission accomplishment;<sup>57</sup> men and women coped equally well with wartime stress;<sup>58</sup> and study participants widely—although perhaps incorrectly—viewed pregnancy as the main reason women could not deploy or were returned home early.<sup>59</sup> Yet, the GAO's most significant findings were probably those regarding the cohesion of mixed-gender units.<sup>60</sup> According to the GAO, most of the study participants said that “bonding could be as effective and was sometimes better in a mixed-gender unit.” Moreover, the GAO reported that the following “themes” emerged from its review regarding the impact of gender on unit cohesion:

- The theory that only men can bond is misleading. Individuals who experience a crisis bond because of the crisis—not because they are women or men.
- It did not matter whether you were a woman or a man, per se, but whether the individual wanted to adapt and be versatile and flexible enough to adapt to their working environment. Cohesion is based on individual effort and not gender.
- Gender is not what affects the cohesiveness of a unit. The important factors are individual capabilities, personalities, training, and overall skill levels.<sup>61</sup>

Finally, in 1997, the Rand Corporation issued a monograph report entitled “New Opportunities for Military Women: Effects upon Readiness, Cohesion, and Morale.”<sup>62</sup> This report addressed many of the same issues that the GAO's report on the Persian Gulf War had addressed, with remarkably similar results.<sup>63</sup> For example, in discussing the effects of gender integration on readiness, the authors of the study found that the majority of the individuals surveyed viewed women's duty performance to be as good as or better than men's;<sup>64</sup> units used teamwork effectively to overcome individual strength limitations;<sup>65</sup> and, while survey participants clearly perceived that women were unavailable for duty more often than men due to pregnancy, the impact on readiness

was negligible if the unit was fully staffed and the proportion of women in the unit was representative.<sup>66</sup> Similarly, in discussing the effects of gender integration on cohesion, the authors found that gender differences alone did not erode cohesion.<sup>67</sup> Instead, the authors found that “[g]ender was an issue only in units characterized as divided into conflicting groups, and then it took second place to divisions along the lines of work groups or, within work groups, along the lines of rank.”<sup>68</sup> Finally, in discussing the effects of gender integration on morale, the authors noted that leadership had the greatest impact on morale, and that good leadership could resolve most gender-related morale problems.<sup>69</sup>

### The History of the Combat Exclusion Policies

*Congressional Restrictions.* No law currently prohibits the assignment of women in the military to combat duties. Congress repealed the prohibition against the assignment of women to duty in combat aircraft in 1991,<sup>70</sup> and it repealed the prohibition against the assignment of women to duty on combat vessels in 1993.<sup>71</sup> In so doing, however, the House of Representatives cautioned the Department of Defense that it did not intend for its actions to “be construed as tacit...concurrence in an expansion of the assignment of women to units or positions whose mission requires routine engagement in direct combat on the ground, or be seen as a suggestion that selective service registration or conscription include women.”<sup>72</sup> Consequently, Congress strengthened its oversight role with respect to the assignment of women in the military by requiring the Secretary of Defense to notify the House and Senate Armed Services Committees prior to implementing any personnel policy change that would open or close certain units, positions, platforms, or vessels to women.<sup>73</sup> In addition, Congress imposed several requirements on the Secretary of Defense related to gender-neutral performance

standards, to including requiring the Secretary of Defense to ensure that the qualification of members of the Armed Forces for military occupational career fields that were open to both men and women be evaluated based upon “common, relevant performance standards, without differential standards or evaluation on the basis of gender;”<sup>74</sup> prohibiting the Secretary of Defense from using gender quotas, goals, or ceilings, except as specifically authorized by law, and from changing occupational performance standards to increase or decrease the number of women in an occupational career field;<sup>75</sup> requiring the Secretary of Defense to ensure that any physical requirements deemed essential to the performance of the duties of a particular military occupational career field be applied on a gender-neutral basis;<sup>76</sup> and requiring Secretary of Defense to notify Congress at least 60 days prior to implementing changes to the occupational standards for a military occupational career field if the changes would increase or decrease the number of women assigned to that occupational career field by at least 10 percent.<sup>77</sup>

In 2005, conservative members of the House Armed Services Committee attempted to insert language into the National Defense Authorization Act for Fiscal Year 2006 (FY06 NDAA) that would codify the current Department of Defense policy regarding the assignment of women in the military.<sup>78</sup> Fortunately, a significant number of House members opposed the attempt, which would have barred women from serving in approximately 21,925 positions that had previously been open to them.<sup>79</sup> As a result, the proposed amendment was abandoned.<sup>80</sup>

*Department of Defense Restrictions.* On February 2, 1988, the Secretary of Defense issued a policy memorandum to implement the “risk rule” for the assignment of

women in the military;<sup>81</sup> however, the rule did not reflect the realities of the modern battlefield. Therefore, the Secretary of Defense issued a new policy memorandum on April 28, 1993.<sup>82</sup> This policy memorandum directed the Services to “open up more specialties and assignments to women,” except for “units engaged in direct combat on the ground, assignments where physical requirements are prohibitive and assignments where the costs of appropriate berthing and privacy arrangements are prohibitive.”<sup>83</sup> Moreover, it directed the Services to “permit women to compete for assignments in aircraft, including aircraft engaged in combat missions;” it directed the Navy to “open as many additional ships to women as is practicable within current law,” and to develop a legislative proposal to repeal the prohibition against assigning women in the Navy to duty on combat vessels; and it direct the Army and the Marine Corps to “study opportunities for women to serve in additional assignments, including, but not limited to, field artillery and air defense artillery.”<sup>84</sup> Finally, it established a committee to review and make recommendations regarding the appropriateness of the “risk rule.”<sup>85</sup>

On January 13, 1994, the Secretary of Defense issued a third policy memorandum to rescind the “risk rule” and replace it with the “direct ground combat assignment rule.”<sup>86</sup> The new rule, which remains in effect today, excludes women “from assignment to units below the brigade level whose primary mission is to engage in direct [ground] combat.”<sup>87</sup> In addition, the policy directs the Services to “use this guidance to expand opportunities for women,” and it prohibits the Services from closing units or positions to women that were previously open to them. Yet, the policy also permits the Services to impose further restrictions on the assignment of women under certain circumstances.<sup>88</sup>

*Service Restrictions.*<sup>89</sup> The current Army policy, which predates the current Department of Defense policy by almost two years, precludes women from serving “in those specialties, positions, or units (battalion size or smaller) which are assigned a routine mission to engage in direct combat, or which collocate routinely with units assigned a direct combat mission”<sup>90</sup> In addition, the current Army policy states that, “[o]nce properly assigned, female Soldiers are subject to the same utilization policies as their male counterparts” and “will remain with their assigned units and continue to perform their assigned duties” if hostilities occur.<sup>91</sup>

The current Navy policy, which applies to both the Navy and the Marine Corps,<sup>92</sup> permits the assignment of women to “all afloat staffs, all combat air squadrons, and all surface ships that have appropriate berthing arrangements.”<sup>93</sup> In addition, the current Navy policy permits women to be assigned in a temporary duty status to all squadrons and ships; all units to which women may be permanently assigned; and units that are normally closed to women if the unit is not expected to conduct a combat mission during the period of temporary duty.<sup>94</sup> However, the current Navy policy specifically prohibits the assignment of women to submarines,<sup>95</sup> as well as the assignment of women to:

[I]nfantry regiments and below; artillery battalions and below; any armored units (tanks, amphibious assault vehicles, and light armored reconnaissance); units and positions which are doctrinally required to physically collocate and remain with direct combat units that are closed to women; or units engaged in long-range reconnaissance operations or Special Operations Forces missions, when such billets are inherently like to result in being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel....<sup>96</sup>

*Rand Corporation Assessment.* In 2007, the Rand Corporation issued another monograph report entitled “Assessing the Assignment Policy for Army Women.”<sup>97</sup> This report found that the Department of Defense and the Department of the Army



assignment policies for women are not clearly understood because there is no common understanding of words used in the policies, such as “enemy,” “forward,” “well forward,” and “collocation.”<sup>98</sup> Additionally, the report found that the objectives of the policies are not clear;<sup>99</sup> the assignment of women to support units that have a close relationship with the maneuver units they support may violate the “spirit” of the current policies, even though they do not technically violate the “letter” of those policies;<sup>100</sup> the assignment of women to support units that routinely engage in self-defense activities may violate the Army’s prohibition against women participating in “direct combat,” depending upon how one interprets the phrase “repelling the enemy’s assault;”<sup>101</sup> the assignment of women to support units that interact directly with and in close proximity to maneuver units may violate the Army’s prohibition against women collocating routinely with units that are assigned a direct combat mission;<sup>102</sup> and the language and concepts in the current policies are not well suited to modern warfare.<sup>103</sup> As a result, the authors of the report recommended revising the existing policies.<sup>104</sup>

### The Constitutionality of the Combat Exclusion Policies

The Supreme Court has never considered the constitutionality of the combat exclusion policies directly, and it has historically granted great deference to legislative and executive branch decisions regarding military affairs. Nevertheless, the Supreme Court’s decision in *United States v. Virginia*,<sup>105</sup> where the Supreme Court ruled that Virginia’s exclusion of women from the Virginia Military Institute (VMI) was unconstitutional, coupled with changes to both the combat exclusion policies and the nature of warfare, casts considerable doubt on the continued validity of the current policies.

*Equal Protection Jurisprudence.* The United States Constitution does not specifically require the federal government to provide equal protection of the laws. Yet, the Supreme Court has held that the equal protection principles that apply to the States pursuant to the Fourteenth Amendment<sup>106</sup> apply equally to the federal government pursuant to the Due Process Clause of the Fifth Amendment.<sup>107</sup> Therefore, the federal government must generally treat similarly situated persons or classes of persons the same.<sup>108</sup>

The standard the Supreme Court has applied to determine the constitutionality of gender-based classifications has evolved over time, along with the status of women in American society. Initially, the Court upheld statutes if they were rationally related to a legitimate public purpose.<sup>109</sup> Beginning in the early 1970s, however, the Court began to craft a more stringent standard of review. In *Reed v. Reed*,<sup>110</sup> for example, the Court recognized that “the objective of reducing the workload on probate courts by eliminating one class of contests” was a legitimate public purpose.”<sup>111</sup> Yet, the Court unanimously rejected this outwardly rational explanation and concluded that an Idaho statute that gave males a mandatory preference over females in the appointment of administrators for intestate decedents’ estates violated the Equal Protection Clause of the Fourteenth Amendment because it provided “dissimilar treatment for men and women who [were] similarly situated.”<sup>112</sup>

Two years later, the Supreme Court clearly rejected the “rational basis” standard in *Frontiero v. Richardson*.<sup>113</sup> In so doing, the Court held that statutes that did not permit servicewomen to claim their spouses as their dependents in the same manner as servicemen and served “no purpose other than ‘administrative convenience’” were

unconstitutional.<sup>114</sup> Unfortunately, the justices could not agree on the correct standard of review.<sup>115</sup> Four justices believed that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny,”<sup>116</sup> while three justices believed that it was “unnecessary for the Court...to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding.”<sup>117</sup> Instead, the three justices who agreed that the statutes were unconstitutional felt that the Court should decide the case based upon its previous decision in *Reed v. Reed*.<sup>118</sup>

The Supreme Court finally settled on an appropriate standard of review for gender-based classifications in *Craig v. Boren*.<sup>119</sup> This standard, which is generally referred to as the “intermediate scrutiny” standard, requires gender-based classifications to “serve important governmental objectives and...be substantially related to the achievement of those objectives,”<sup>120</sup> and has been used to decide a multitude of cases involving gender-classifications since its adoption in 1976, to include several military cases. In *Owens v. Brown*,<sup>121</sup> for example, the United States District Court for the District of Columbia used the intermediate scrutiny standard to determine that Title 10, United States Code, Section 6015, which barred women in the Navy from “performing any duty in any capacity aboard any ship,”<sup>122</sup> was “too broad to pass muster” under the Fifth Amendment.<sup>123</sup> In so doing, the District Court recognized that the Navy’s interest in increasing the combat effectiveness of its ships was “a governmental objective of the highest order and a purpose entitled to great respect,” but it questioned whether this was the actual purpose of the statute.<sup>124</sup> Furthermore, the District Court rejected the Navy’s concerns that assigning women to vessels would

undermine morale and discipline and “pose serious problems in terms of providing separate quarters and facilities,” noting that these problems “can be dealt with through appropriate training and planning.”<sup>125</sup>

*The Impact of United States v. Virginia.* In a 7-1 decision in 1996, the Supreme Court found that Virginia’s exclusion of women from VMI violated the Equal Protection Clause of the Fourteenth Amendment.<sup>126</sup> The case is significant for several reasons. First, the Court arguably added a new component to the “intermediate scrutiny” standard by requiring the party defending a gender-based government action to demonstrate an “exceedingly persuasive justification” for the action that is “genuine” and does not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>127</sup> Second, the Court rejected Virginia’s argument that modifying VMI’s adversative method of training to accommodate women would destroy the program, noting that Virginia’s argument “is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophec[ies].’”<sup>128</sup> Third, the Court made several significant comments in dicta regarding gender-based classifications. In discussing the Court’s prior precedents, for example, the Court noted that gender-based classifications “may not be used, as they once were,...to create or perpetuate the legal, social, and economic inferiority of women.”<sup>129</sup> Similarly, in discussing whether Virginia’s remedial plan to establish a separate program for women cured the constitutional violation, the Court noted that “generalizations about ‘the way women are’ [and] estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”<sup>130</sup>

To withstand judicial scrutiny in the aftermath of *United States v. Virginia*, the Government will have to demonstrate that the current combat exclusion policies serve important government objectives; that the policies are substantially related to the achievement of those objectives; and that the justification for the policies are “exceedingly persuasive.” Yet, many of the reasons proffered in the past to support the current policies—such as women’s physical abilities, the potential impact on unit cohesion and readiness, and the lack of public support—are anything but persuasive.<sup>131</sup> Moreover, all these reasons rely upon “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>132</sup>

The most persuasive justification for the current combat exclusion policies is arguably the assertion that most women are physically unable to perform the tasks required for direct ground combat. Most women simply do not have the same physical strength or stamina as men. Nevertheless, there are some women who can meet, and may even exceed, the physical requirements necessary to perform such tasks, just as there are some men who cannot meet the requirements. Additionally, it is important to note that women in the military today receive the same basic combat skills training as men, to include hand-to-hand combat training.<sup>133</sup> Therefore, to the extent that the current policies exclude all women from assignment to units whose primary mission is to engage in direct ground combat, the policies are overbroad and do not satisfy the requirement that they be substantially related to the government’s important interest in maintaining a combat effect force to fight and win our nation’s wars.

Several studies and surveys conducted during the last two decades have demonstrated that many of the remaining justifications for the current combat exclusion

policies are either disingenuous or invalid. For example, both the GAO's "Persian Gulf War" report and the RAND Corporation's "New Opportunities" report negate the argument that assigning women to direct ground combat units will undermine the cohesion of those units.<sup>134</sup> Men and women have been deploying as part of mixed-gender units for many years, and there is no reason—except, perhaps, for lingering prejudices and antiquated notions regarding the proper role of women in the military—to believe that direct ground combat units will experience less cohesion than other mixed-gender units if they are fully integrated. Similarly, both these reports negate the argument that assigning women to direct ground combat units will undermine the readiness of those units.<sup>135</sup> While pregnancy can have an adverse impact on a female service member's availability for certain duties, the extent to which pregnancy has had an actual or disproportionate impact on the readiness of deployed or deploying units is not apparent. Moreover, pregnancy is a transitory condition that should be treated like any other temporarily disabling medical condition. Finally, recent polls negate the argument that the American public does not support the assignment of women to direct ground combat units.<sup>136</sup> As a result, none of these justifications for the current combat exclusion policies comply with the Supreme Court's admonition in *United States v. Virginia* that "the justification must be genuine...[a]nd must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>137</sup>

Two additional justifications for the current combat exclusion policies (*i.e.*, that there is no military need for women to serve in direct ground combat units because there are an adequate number of men available, and that most women do not support

their involuntary assignment to direct ground combat units) are likewise invalid under the Supreme Court's decision in *United States v. Virginia*. Like the assertion that most women are physically unable to perform the tasks required for direct ground combat, neither of these justifications are substantially related to the government's interest in maintaining a combat effect force to fight and win our nation's wars. Indeed, both justifications are either irrelevant or counterintuitive. The fact that the Department of Defense has enough men to fill all positions in all direct combat units, which is debatable, does not mean that women who are equally qualified to fill those positions can or should be prohibited from doing so. Moreover, there is no rational reason to permit women to pick and choose the duties to which they may be assigned. Soldiers are soldiers, and they are obligated to carry out the orders of the superiors appointed over them. Therefore, to the extent that a woman is as qualified as a man to perform the tasks required for direct ground combat, they should be required to carry out those duties.

*The Military Deference Doctrine.* The Constitution gives Congress the authority to “raise and support Armies,” “provide and maintain a Navy,” and “make Rules for the Government and Regulation of the land and naval Forces,”<sup>138</sup> and it designates the President as “Commander in Chief of the Army and Navy of the United States....”<sup>139</sup> Consequently, the Supreme Court has historically granted great deference to legislative and executive branch decisions regarding military affairs.<sup>140</sup> In *Rostker v. Goldberg*,<sup>141</sup> for example, the Court confirmed that it gives Congress great deference over national defense and military affairs—partially because the Court “has consistently recognized ‘Congress’ broad constitutional power’ to raise and regulate armies and navies,”<sup>142</sup> and

partially because the courts' lack of competence in this area "is marked."<sup>143</sup> The Court then noted that "the tests and limitations to be applied may differ because of the military context," and cautioned that the Court "must be particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch."<sup>144</sup> Finally, the Court stated that "judicial deference to [the] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>145</sup>

Yet, despite the deference that the Supreme Court normally grants to legislative and executive branch decisions regarding military affairs, it is by no means clear that the Court would automatically uphold the current combat exclusion policies for two reasons. First, the Court in *Rostker* unambiguously stated that "deference does not mean abdication."<sup>146</sup> Moreover, the Court declined to accept the Solicitor General's argument that it should apply the "rational basis" standard to cases implicating legislative decisions regarding military affairs.<sup>147</sup> Accordingly, the Court will likely consider the merits of a constitutional challenge to the current policies using the standard articulated in *United States v. Virginia*, even if it applies that standard in a slightly more lenient manner. Second, neither Congress' nor the Department of Defense's intent with respect to the exclusion of women from combat is readily apparent. Even though Congress continues to exercise its oversight authority over the Department of Defense with respect to the current policies, an attempt two years ago to codify the Department of Defense policy in Title 10 of the United States Code failed.<sup>148</sup> In addition, the Department of Defense recently took steps to lift the prohibition against



the assignment of women to submarines and acknowledged that “women in uniform are in combat missions every day.”<sup>149</sup> Finally, the Chief of Staff of the Army recently testified that it was time to “take a look at what women are actually doing in Iraq and Afghanistan and to look at our policy.”<sup>150</sup>

### The Need to Rescind the Current Policies

Rescinding the current combat exclusion policies is both an ethical imperative and a leadership challenge. Rescinding the current policies is an ethical imperative—particularly for the Army—for four reasons. First and foremost, the current policies, as discussed above, are likely unconstitutional. Accordingly, the Department of Defense risks being forced to rescind the policies involuntarily as a result of future litigation. Second, even if the current policies are able to survive a constitutional challenge, they remain unnecessarily paternalistic and discriminatory. The policies do not afford women the same opportunities as men because they contain blanket prohibitions that preclude women from serving in specialties, positions, and units for which they may be physically qualified. The policies are, therefore, inherently unfair and unjust. Third, the recent RAND Corporation assessment found that the current policies are not well understood and their objectives are not clear.<sup>151</sup> As a result, the Army is arguably violating the spirit of the current Department of Defense policy,<sup>152</sup> and perhaps the letter of the current Army policy.<sup>153</sup> Finally, the recent RAND Corporation assessment generally found that the current policies are not appropriate for the environment in which the military presently operates, and that personnel who had recently returned from Iraq viewed the current policies as “obsolete,” “archaic,” and “a step back.”<sup>154</sup> As a matter of fact, women returning from Iraq and Afghanistan have been in direct physical contact with the enemy. Consequently, it appears that Army leaders are ignoring (or

circumventing) the existing policies because they see them as impediments to the Army's mission.<sup>155</sup>

Rescinding the current combat exclusion policies is also a leadership issue because effective leadership will be necessary to overcome both the military's inherent resistance to change and any lingering cultural biases against permitting women to participate in combat operations, even if they are physically capable of doing so. Prohibitions against permitting women to participate in combat operations have existed for many years, and they are deeply engrained. Therefore, it may be difficult to convince some segments of the military, as well as some segments of the general public, that rescinding the current policies is a necessary step in the right direction. Thankfully, however, difficult does not mean impossible.

To ensure that any proposal to rescind the current policies is successful, senior leaders in Department of Defense must do four things. First, they must ensure that adequate time and resources are devoted to developing gender-neutral performance standards for those specialties and positions that require specific physical capabilities. Second, they must develop a single strategic vision for the future that recognizes the critical role that women play in the environment in which the military currently operates. Third, they must communicate their vision to relevant stakeholders and make their case for why change is necessary by engaging the stakeholders personally and through carefully selected subordinate spokespersons.<sup>156</sup> Simply mandating that the current policies be rescinded, and that all specialties, positions, and units be opened immediately to women, will fail. Stakeholders, to include service members, their families, members of Congress, and members of the general public must clearly

understand and internalize why the proposed changes are necessary for the military to fight and win in an asymmetric environment that does not lend itself to the strict segregation of combat-related functions based upon gender. Moreover, stakeholders must clearly understand that rescinding the current policies will not result in the assignment of women to specialties or positions that they are physically incapable of performing. Finally, senior leaders must utilize appropriate embedding and reinforcing mechanisms to overcome any lingering cultural resistance to the rescission of the combat exclusion policies and ensure that their vision is implemented throughout the Department of Defense.<sup>157</sup> Thus, senior leaders must ensure that the force is restructured to accommodate the revised assignment policies; that service members are trained regarding the changes to the assignment policies and the reasons for those changes; that commanders inspect how the revised assignment policies and physical capability standards are being implemented and take immediate action to eliminate impediments to their implementation; and that organizations and units that implement the revised assignments policies successfully are publicly recognized and rewarded.<sup>158</sup>

## Conclusion

We have reached a “tipping point” with respect to the role that women can and should play in the military.<sup>159</sup> The nature of modern warfare requires the Department of Defense and the Services to align their assignment policies with the reality of today’s combat environment. This process may not be easy, and it will not happen overnight. Numerous groups—both internal and external to the military—will oppose any change that opens additional specialties or positions to women, especially if those specialties or positions may expose women to direct combat. Nevertheless, successful change is possible if we are persistent and our senior leaders embrace and pursue change with

the vigor and enthusiasm the issue deserves. Moreover, it is better for our leaders to make the change themselves than to have the courts direct them to end the discriminatory exclusion of women from military specialties, positions, and units that involve direct ground combat.

## Endnotes

<sup>1</sup> President Harry S. Truman, "Executive Order 9981, Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services," July 26, 1948, <http://www.trumanlibrary.org/9981a.htm> (accessed March 20, 2010). Although President Truman made this statement in reference to racial equality in the military, it is equally applicable to gender equality.

<sup>2</sup> U.S. Secretary of Defense Les Aspin, "Direct Ground Combat Definition and Assignment Rule," memorandum for Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Assistant Secretary of Defense (Personnel and Readiness), and the Assistant Secretary of Defense (Reserve Affairs), January 13, 1994.

<sup>3</sup> U.S. Department of the Army, *Army Policy for the Assignment of Female Soldiers*, Army Regulation (AR) 600-13 (Washington, DC: U.S. Department of the Army, March 27, 1992), 1.

<sup>4</sup> Jeanne Holm, *Women in the Military: An Unfinished Revolution* (Novato, CA: Presidio Press, 1982), 9.

<sup>5</sup> *An Act to Establish a Women's Army Corps for Service in the Army of the United States*, Public Law 110, 78<sup>th</sup> Cong., 1<sup>st</sup> sess. (July 1, 1943), 347-348.

<sup>6</sup> *An Act to Amend Titles 10, 32, and 37, United States Code, to Remove Restrictions on the Careers of Female Officers in the Army, Navy, Air Force, and Marine Corps, and for Other Purposes*, Public Law 90-130, 90<sup>th</sup> Cong., 1<sup>st</sup> sess. (November 8, 1967), 406-419.

<sup>7</sup> *Department of Defense Appropriations Act, 1976*, Public Law 94-106, § 808, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (October 7, 1975).

<sup>8</sup> *National Defense Authorization Act for Fiscal Years 1992 and 1993*, Public Law 102-190, § 531, 102<sup>nd</sup> Cong., 1<sup>st</sup> sess. (December 5, 1991), 69, <http://www.lexis.com> (accessed November 19, 2009).

<sup>9</sup> *National Defense Act for Fiscal Year 1994*, Public Law 103-160, § 541, 103<sup>rd</sup> Cong., 1<sup>st</sup> sess. (November 30, 1993), 91, <http://www.lexis.com> (accessed November 19, 2009).

<sup>10</sup> Holm, *Women in the Military: An Unfinished Revolution*, 4.

<sup>11</sup> *Ibid.* The Continental Congress created a hospital department at General Washington's request and authorized it to pay civilian nurses approximately twenty-five cents per day. Mattie

E. Treadwell, *U.S. Army in World War II—Special Studies: The Women's Army Corps* (Washington, D.C.: United States Army Center for Military History, 1991), 3-4, <http://www.history.army.mil/books/wwii/Wac/index.htm> (accessed January 22, 2010).

<sup>12</sup> Two of the women who reportedly participated in direct ground combat when their husbands were incapacitated or killed were Margaret Cochran Corbin and Mark Ludwig Hays McCauley (a.k.a., Molly Pitcher). Holm, *Women in the Military: An Unfinished Revolution*, 3-4.

<sup>13</sup> One of the women who disguised herself as a man to fight was Deborah Sampson Gannett (a.k.a. Robert Shirliffe). *Ibid.*, 5.

<sup>14</sup> Three of the many notable women who served with the military during the Civil War were Dr. Mary Walker, Miss Dorothea Dix, and Miss Clara Barton. Dr. Mary Walker volunteered to treat wounded soldiers after her request for a commission as a medical officer was denied; she was captured and held in a Confederate prison for four months; and she was ultimately awarded the Congressional Medal of Honor for her "devotion and patriotic zeal to sick and wounded soldiers both in the field and in hospitals to the detriment of her own health." "History Archive: Dr. Mary Walker," linked from *The Women in Military Service for America Memorial Foundation, Inc., Home Page* at "History & Collections," <http://www.womensmemorial.org/H&C/History/walker.html> (accessed January 15, 2010). Ms. Dorothea Dix became the Superintendent of Women Nurses in 1961; she established the criteria for contract nurses and matrons; and she oversaw the staffing of military hospitals for the War Department. "Early Years: Civil War," linked from *The Women in Military Service for America Memorial Foundation, Inc., Home Page* at "History & Collections," [http://www.womensmemorial.org/H&C/History/earlyyears\(civil\).html](http://www.womensmemorial.org/H&C/History/earlyyears(civil).html) (accessed January 15, 2010). Miss Clara Barton collected and distributed supplies to help wounded soldiers; she nursed soldiers in a volunteer capacity at the several battles; and she established the American branch of the International Red Cross in 1881. "History Archive: Clara Barton," linked from *The Women in Military Service for America Memorial Foundation, Inc., Home Page* at "History & Collections," <http://www.womensmemorial.org/H&C/History/barton.html> (accessed January 15, 2010).

<sup>15</sup> Estimates of the number of women who served as nurses during the Civil War vary. One source indicated that "six thousand nurses were recruited and trained for services with the Army of the North." Holm, *Women in the Military: An Unfinished Revolution*, 8. Another source indicated that 500 nurses served under Miss Dix, another 2,700 provided care to Union soldiers, and approximately 1,000 provided care to Confederate soldiers. "Early Years: Civil War."

<sup>16</sup> Holm, *Women in the Military: An Unfinished Revolution*, 6.

<sup>17</sup> *Ibid.*

<sup>18</sup> The contribution that contract nurses made during the Spanish American War convinced the Surgeon General that women should be made a permanent part of his medical services. *Ibid.*, 9.

<sup>19</sup> The Army Reorganization Act of 1901 permitted women to serve officially in the military for the first time; however, women had only a "quasi-military" status. They had no military rank, they did not receive equal pay, and they did not receive the benefits normally associated with military service. *Ibid.*, 9.

<sup>20</sup> The Naval Reserve Act of 1916 authorized the Navy to enlist “citizens.” As a result, the Secretary of the Navy could legally enlist both men and women. Ibid., 9-10, 17.

<sup>21</sup> The Naval Reserve Act of 1925 changed the word “citizens” in the Naval Reserve Act of 1916 to “male citizens.” Ibid., 17.

<sup>22</sup> The Director of Women’s Relations, Miss Anita Philips, drafted the 1926 plan, and the chief Army planner for a women’s corps, Major Everett S. Hughes, drafted the 1928 plan. Treadwell, *The Women’s Army Corps*, 12-14.

<sup>23</sup> The Chief of Staff of the Army, George C. Marshall, was particularly interested in the creation of a Women’s Army Auxiliary Corps (WAAC) and advocated strongly for passage of the WAAC legislation. Ibid., 15-25.

<sup>24</sup> One member said:

I think it is a reflection upon the courageous manhood of the country to pass a law inviting women to join the armed forces in order to win a battle. Take the women into the armed service, who then will do the cooking, the washing, the mending, the humble homey tasks to which every woman has devoted herself? Think of the humiliation! What has become of the manhood of America?

Ibid., 25.

<sup>25</sup> *An Act to Establish a Women’s Army Auxiliary Corps for Service with the Army of the United States*, Public Law 554, 77th Cong., 2<sup>nd</sup> sess. (May 14, 1942), 409-414. Unfortunately, the final statute establishing the WAAC failed to integrate women into the Regular Army or give them military status. Ibid. As a result, women in the WAAC could not command men; they initially served under a different rank structure and received less pay than their male counterparts; they were not entitled to overseas pay, government life insurance, veterans’ medical coverage, or death benefits; and they were not protected under international agreements if they were captured. Ibid.; Treadwell, *The Women’s Army Corps*, 96-97, 113-115.

<sup>26</sup> *Naval Reserve Act of 1938*, Public Law 689, 77th Cong., 2<sup>nd</sup> sess. (July 30, 1942), 986-987. Congress established the WAVES as a branch of the Naval Reserves “[t]o expedite the war effort by releasing officers and men for duty at sea and their replacement by women in the shore establishment of the Navy, and for other purposes,” but it imposed several limitations on its members. Ibid. For example, the number and grade of women in the WAVES were restricted. Ibid. In addition, women could not command men; they were restricted to shore duty within the continental United States; they could not be assigned to duty on board vessels or in combat aircraft; and they were not initially entitled to military death or disability benefits. Ibid.

<sup>27</sup> *An Act to Establish a Women’s Army Corps for Service in the Army of the United States*, 347-348. Although legislation was subsequently passed to rectify some of the problems associated with the WAAC Act, women were not integrated into the Regular Army or given full military status until Congress passed the WAC Act. Treadwell, *The Women’s Army Corps*, 117-118.

<sup>28</sup> The passage of the WAC Act did not give women full equality. Among other restrictions, the number and grade of WACs were still capped, and WACs were still precluded from commanding and men. Ibid., 220.

<sup>29</sup> Holm, *Women in the Military: An Unfinished Revolution*, 100.

<sup>30</sup> The senior leaders and officers who supported making women a permanent part of the military included Secretary of Defense James V. Forrestal; Army Generals Eisenhower, Bradley, and Paul; Army Brigadier General Armstrong; Navy Admirals Denfeld and Nimitz; Navy Vice Admiral Radford; Navy Rear Admirals Pugh, Buck, and Stone; Air Force Generals Spaatz, Vandenberg, and Eaker; and Marine Corps General Vandegrift. Treadwell, *The Women's Army Corps*, 748; Holm, *Women in the Military: An Unfinished Revolution*, 116.

<sup>31</sup> *Women's Armed Services Integration Act of 1948*, Public Law 625, 80<sup>th</sup> Cong., 2<sup>nd</sup> sess. (June 12, 1948). One source described the Congressional debate regarding the Act as "bitter, sometimes ludicrous, and often acrimonious." Holm, *Women in the Military: An Unfinished Revolution*, 113.

<sup>32</sup> *Women's Armed Services Integration Act of 1948*, 383, 388. The Women's Armed Services Integration Act of 1948 did not limit the assignment of women in the Army to combat duties because the Army had already limited the assignment of women to such duties by policy. Instead, Section 101 of the Act simply stated that "there is established in the Regular Army a Women's Army Corps, which shall perform such services as may be prescribed by the Secretary of the Army." Ibid., 372. In contrast, Section 210 of the Act stated that: "The Secretary of the Navy may prescribe...the type of military duty to which [women] may be assigned: *Provided*, That they shall not be assigned to duty in aircraft while such aircraft are engaged in combat missions nor shall they be assigned to duty on vessels of the Navy except hospital ships and naval transports," and Section 307(a) of the Act stated that: "The Secretary of the Air Force shall prescribe...the kind of military duty to which [women] may be assigned: *Provided*, That they shall not be assigned to duty in aircraft while such aircraft are engaged in combat missions." Ibid., 383, 388. Some of the other limitations that the law imposed on women included a limitation on the overall end strength of women to 2 percent of the authorized Regular end strength for their service; a limitation on the highest permanent grade at which female officers could serve to lieutenant colonel (or commander in the Navy); a limitation on the total number of officers who could serve to 10 percent of the total number of enlisted women; a limitation on the ability of women to enlist below the age of 21 without their parents' or their guardians' written consent; and a limitation on the ability of women to claim their husbands and children as dependents, unless their husbands and children were, in fact, dependent upon them for their chief support. Ibid., 372-373, 376, 378-379, 383, 386-389.

<sup>33</sup> Approximately 1,000 women served in Korea during the Korean Conflict, and approximately 7,500 women served in Vietnam during the Vietnam War. "Statistics on Women in the Military," linked from *Women in Military Service for America Memorial Foundation, Inc.*, Home Page at "For the Press," (accessed January 25, 2010).

<sup>34</sup> *An Act to Amend Titles 10, 32, and 37, United States Code, to Remove Restrictions on the Careers of Female Officers in the Army, Navy, Air Force, and Marine Corps, and for Other Purposes*, 406-419.

<sup>35</sup> *Department of Defense Appropriation Authorization Act, 1979*, Public Law 95-485, § 820, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess. (October 20, 1978), 1627-1628.

<sup>36</sup> Approximately 170 women deployed to Grenada during Operation Urgent Fury, and approximate 770 women deployed to Panama during Operation Just Cause. "Statistics on Women in the Military."

<sup>37</sup> See U.S. General Accounting Office, *Women in the Military: Deployment in the Persian Gulf War* (Washington, D.C.: U.S. General Accounting Office, July 1993), 2-5. In its report, the GAO indicated that approximately 41,000 women deployed in support of Operations Desert Shield and Desert Storm, which was approximately 7 percent of the total United States force. *Ibid.*, 2. In addition, the GAO indicated that "[u]nit activities took some Air Force, Army, and Marine Corps women into Iraq and/or Kuwait even during the air and ground wars" and "[s]ome women were exposed to other kinds of hostilities: for example, they received enemy fire, returned fire, and/or dealt with enemy prisoners." *Ibid.*, 19. In contrast, at their peak strength, only 17,000 WACs served in overseas combat theaters during World War II. Holm, *Women in the Military: An Unfinished Revolution*, 94.

<sup>38</sup> Presidential Commission on the Assignment of Women in the Armed Forces, *Women in Combat: Report to the President* (Washington, D.C.: Brassey's (US), 1993). Congress established the Presidential Commission on the Assignment of Women in the Armed Forces to "assess the laws and policies restricting the assignment of female service members and...make findings on such matters." *National Defense Authorization Act for Fiscal Years 1992 and 1993*, § 542, 70.

<sup>39</sup> Presidential Commission on the Assignment of Women in the Armed Forces, *Women in Combat: Report to the President*, 98, 104-106, 113. Several Commissioners specifically addressed the divisiveness of the Commission. For example, Major General Mary E. Clarke, U.S. Army (Retired), indicated in her statement that:

Early on in the deliberations, it became clear that a number of the Commissioners had come with a set agenda and no amount of facts or testimony would change their minds for expanding opportunities for women in the military. This was evident in their questioning techniques of those whose testimony they thought might support women in combat, absenting themselves when they knew testimony would not support their views, and their insistence upon using equal opportunity as a red herring rather than recognizing women's capabilities and contributions to the military services.

*Ibid.*, 98. Similarly, Captain Mary M. Finch, U.S. Army, indicated in her statement that:

From the start, a minority of conservative Commission members attempted to demean and degrade service women and their accomplishments at every turn. Through supposed expert testimony to outright distortion of facts, some Commission members attacked the abilities of women in jobs to which they are already assigned, and disparaged those senior military officials who spoke out in favor of women; all in the name of preserving the supposed high status of women in American society and American family values. These Commissioners would have liked us to believe that were the roles of women in the Armed Forces to



expand, American society would be led down the path of moral corruption from which it would never return.

Ibid., 106.

<sup>40</sup> *National Defense Authorization Act for Fiscal Years 1992 and 1993*, § 543, 71.

<sup>41</sup> Presidential Commission on the Assignment of Women in the Armed Forces, *Women in Combat: Report to the President*, 3. In discussing the issue of voluntary versus involuntary duty, the Commission concluded that “a policy implementing special standards, set-asides, or privileges for one gender would be contrary to the interests of both sexes and the military;” a policy that permitted women to be assigned to positions on a voluntary basis, while men were assigned involuntarily, would result in “animosity between the genders” and could have an adverse impact on cohesion; and “such a policy may not be constitutional under the Due Process Clause of the Fifth Amendment.” Ibid.

<sup>42</sup> Ibid., 5. The Commission noted that “the main purpose of military physical fitness programs is to promote good health and wellness and that **general** fitness standards should not be linked to specific occupations.” Ibid. The Commission then noted that only 3.4 percent of the women tested in study investigating whether women could meet the same physical fitness standards as men could meet the male mean score on the Army Physical Fitness Test. Ibid.

<sup>43</sup> Ibid., 7, 13. The Commission addressed occupational physical requirements and gender-related occupational standards separately, but their findings and recommendations overlapped to a large extent. In discussing occupational physical requirements, the Commission indicated that it was influenced by a survey in which 70 percent of the military personnel polled strongly agreed that the “physical standards for each combat assignment should reflect the demands of that assignment on a gender-neutral basis,” and another 17 percent agreed with the statement. Ibid., 7. Then, in its discussion of gender-related occupational standards, the Commission noted that:

Testimony from physiologists indicated that women, in general, are shorter, weigh less, have less muscle mass and have a greater relative fat content than men. In terms of military significance, women are at a distinct disadvantage when performing military tasks requiring a high level of muscular strength and aerobic capacity, due to their lower muscle mass and greater relative fat mass. The dynamic upper torso muscular strength of women is approximately 50 to 60 percent that of men, while their aerobic capacity is approximately 70 to 75 percent that of men. Thus it is important that specialty-related standards not be gender-normed.

Ibid., 13.

<sup>44</sup> Ibid., 22. A majority of the Commission concluded that “the ‘American experience’ does not preclude assigning capable women to direct combat positions for which they are qualified,” and that, “under some circumstances, American society not only allows, but actually encourages and approves the further integration of women into combat roles.” Ibid., 22-23. In addition, a majority of the Commission noted that: “A number of witnesses, Members of Congress and senior military women advanced the belief that women should not be barred from

any position in the military unless there is convincing evidence that they cannot meet the occupational demands.” Ibid., 22.

<sup>45</sup> Ibid., 31. The Commission recommended continuing to prohibit the assignment of women to submarines and amphibious vessels due to the cost of modifying those vessels to accommodate female crew members; however, the Commission recommended rescinding the remaining prohibitions against the assignment of women to combat vessels. In so doing, the Commission relied upon actual performance reports of mixed-gender crews and disregarded the possibility of cohesion problems, noting that the Navy had no specific studies on the issue. Ibid., 31-32.

<sup>46</sup> Ibid., 28. Even though the Commission acknowledged that “the evidence indicates that women are capable of flying and competing with men in combat aviation assignments,” a bare majority of the Commission recommended reinstating the prohibition against assigning women to aircraft engaged in combat missions based solely upon concerns regarding cohesion, the treatment to which women might be subjected if they were shot down and captured, and the impact such treatment might have on male prisoners and the American public. Ibid., 28-29. In response, the minority members of the Commission noted that “[c]ohesion is a function of leadership, shared purposes, and common risks and rewards,” and studies of mixed-gender, non-combat aviation units with demanding missions have shown that cohesion remained the same or improved after the integration of women into the unit. Ibid., 81. In addition, the minority members of the Commission correctly noted that women have been taken prisoner in previous conflicts, and the possibility of women being captured in future conflicts should not preclude women from competing for combat aviation assignments. Finally, the minority members of the Commission noted that:

Laws and policies based on paternalistic notions do not demonstrate the value society places in women. More importantly, they preclude the best fighting force. They demean women’s intelligence and abilities, deny them the respect that they deserve as equal members of society, and deny the Armed forces the use of the best qualified individuals.

Ibid., 83.

<sup>47</sup> Ibid., 24. The Commission relied on seven factors to support its recommendation to prohibit the assignment of women to direct ground combat units or positions. First, the Commission relied upon the physiological differences between men and women, noting that:

The evidence before the Commission clearly shows distinct physiological differences between men and women. Most women are shorter in stature, have less muscle mass and weigh less than men. These physiological differences place women at a distinct disadvantage when performing tasks requiring a high level of muscular strength and aerobic capacity, such as hand-to-hand fighting, digging, carrying heavy loads, lifting and other tasks central to ground combat.

Ibid. Nevertheless, the Commission admitted that there were some women who could meet the physical requirements for ground combat. Second, the Commission relied upon the fact that few women were interested in serving in a ground combat specialty. Third, the Commission relied upon a study that indicated that cohesion problems “might” develop, notwithstanding the fact that the Commission conceded that “[t]here are no authoritative military studies of mixed-

gender ground combat cohesion, since available cohesion research has been conducted among male-only ground combat units.” Ibid., 25. Fourth, the Commission relied upon the possibility that women who are captured might be mistreated, and that such mistreatment could have a negative impact on male prisoners. Fifth, the Commission relied upon surveys showing that members of the military were strongly opposed to permitting women to serve in all ground combat branches, even though members of the public held mixed views, with a majority opposed to permitting women to serve in the infantry branch, but in favor of permitting women to serve in the artillery and armor branches. Sixth, the Commission relied upon the fact that “[s]everal countries have placed women in ground combat units with little success.” Ibid., 26. Finally, the Commission considered the potential impact of allowing women to serve in ground combat units on the continued legitimacy of the male-only draft registration, concluding that: “The current ground combat exclusion policies, which are derived from Congressional intent to restrict the assignment of women in other Services, would be vulnerable if the remaining statute [(i.e., the statute prohibiting women from serving on combat vessels)] was appealed.” Ibid., 27.

<sup>48</sup> Ibid., 34. The Commission relied upon many of the same factors to support its recommendation to retain the existing policies prohibiting the assignment of women to Special Operations Forces that it had relied upon to support its recommendation to retain the existing policies prohibiting the assignment of women to direct ground combat units and positions—namely, that women lack the ability to perform the type of physically demanding operations conducted by Special Operations Forces; assigning women to Special Operations Forces would have a negative impact on small unit cohesion; and women who are captured may be mistreated. Ibid.

<sup>49</sup> Ibid., 36. The Commission concluded that the “risk rule” provides “the best mechanism available for maintaining consistency in assignment policies and integrity of the relationship between support and direct land combat units.” Ibid.

<sup>50</sup> U.S. Secretary of Defense Frank C. Carlucci, “Women in the Military,” memorandum for Secretaries of the Military Departments, Washington, D.C., February 2, 1988.

<sup>51</sup> The GAO is now known as the Government Accountability Office.

<sup>52</sup> U.S. General Accounting Office, *Women in the Military: Deployment in the Persian Gulf War*. The GAO noted that its results could not be generalized to the entire deployed population because of the sampling and methodology used during the review. Nevertheless, the GAO believed that its report provided “important and useful insights into how women performed in a variety of roles and units in a lengthy and hostile deployment which exposed some units, regardless of their combatant/noncombatant status, to combat conditions.” Ibid., 5.

<sup>53</sup> Ibid., 21. The GAO noted that both commanders and discussion group participants assessed women’s actual job performance during the deployment in a positive manner. In fact, approximately two-thirds of both the male and female discussion group participants felt that women performed as well as or better than men. Ibid.

<sup>54</sup> Ibid., 21-23. Despite the GAO’s conclusion that “physical strength was neither a problem nor an issue during the deployment,” it is important to note that 28 percent of the male discussion groups felt that women’s strength limitations hindered mission accomplishment on at least one occasion, and approximately 37 percent of the male discussion groups felt that men had to work harder as a result of women’s strength limitations. Ibid.

<sup>55</sup> Ibid., 24. The GAO noted that at least one participant in 22 of the discussion groups, to include 41 percent of the male discussion groups, indicated that “men felt a need to protect women.” Ibid.

<sup>56</sup> Ibid., 29-34. The GAO noted that some service members had no housing during all or part of the deployment; men and women often shared housing, showers, and latrines when such facilities were available; and men and women found ways to adapt to their conditions to preserve their privacy whenever possible. Ibid.

<sup>57</sup> Ibid., 34-36.

<sup>58</sup> Ibid., 36-37.

<sup>59</sup> Ibid., 47-52. Despite the perception that pregnancy was the main reason that women could not deploy or were returned home early, discussion group participants could cite few actual cases. Ibid., 50-51.

<sup>60</sup> Ibid., 38-44. The GAO described cohesion as “the bonding of the members of a unit in such a way as to sustain their will and commitment to each other, the organization, and the mission.” Ibid., 38.

<sup>61</sup> Ibid., 40.

<sup>62</sup> Margaret C. Harrell and Laura Miller, “New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale,” 1997, [http://www.rand.org/pubs/monograph\\_reports/MR896/](http://www.rand.org/pubs/monograph_reports/MR896/) (accessed January 15, 2010). This study was sponsored by the Under Secretary of Defense for Personnel and Readiness in response to an item of special interest in the House Report for the National Defense Authorization Act for Fiscal Year 1997, which directed the Secretary of Defense to evaluate the integration of women into occupations previously closed to them. Ibid., iii, xv, 4. Unfortunately, the study had to be conducted in three months because of the deadline set by the House of Representatives. As a result, the authors indicated that it was not “a comprehensive analysis.” Ibid., xv. Nevertheless, the authors also indicated that the study “provides important insights about the effects of gender integration in previously closed units and units with previously closed occupations, in the context of unit readiness, cohesion, and morale.” Ibid., 5.

<sup>63</sup> Ibid., xvii-xviii. Overall, the authors concluded that “gender integration is perceived to have a relatively small effect on readiness, cohesion, and morale...” Ibid., xvii.

<sup>64</sup> Ibid., 43. The survey data indicated that 65 percent of officers, 68 percent of senior non-commissioned officers (E7-E9) and 52 percent of junior noncommissioned officers (E5-E6) felt that women “tend to perform in the same range as men do,” and that 6 percent of officers, 6 percent of senior NCOs, and 7 percent of junior NCOs felt that women “tend to perform better than men.” In contrast, 32 percent of junior enlisted service members (E1-E4) felt that women “tend to perform worse than men;” 38 percent felt that women “tend to perform in the same range as men do;” and only 2 percent felt that women “tend to perform better than men.” Ibid.

<sup>65</sup> Ibid., 47.

<sup>66</sup> Ibid., 39-42. The authors also assessed the impact of single parents and gender-related illnesses and injuries on readiness. With respect to single parents, the authors noted that there are numerically more single fathers in the military than there are single mothers, and that most of the issues associated with single parenthood are resolvable. Ibid., 41. With respect to gender-related illnesses and injuries, the authors could not confirm reports that women were on sick call, light duty, or profile more frequently than men. Ibid., 41-42.

<sup>67</sup> Ibid., 54. In the report, the authors distinguished between social cohesion, which “refers to the nature and quality of the emotional bonds of friendship, liking, caring, and closeness among group members,” and task cohesion, which “refers to the shared commitment among members to achieving a goal that requires the collective efforts of the group.” Ibid., 53-54.

<sup>68</sup> Ibid., 66. Interestingly, when the authors explored the issue of men’s protective instincts towards women, virtually all of the people who were asked to think about dangerous situations to which they had actually responded indicated that no one paid attention to gender when taking action. Ibid., 65-66.

<sup>69</sup> Ibid., 83.

<sup>70</sup> *National Defense Authorization Act for Fiscal Years 1992 and 1993*, § 531, 69.

<sup>71</sup> *National Defense Act for Fiscal Year 1994*, § 541, 91. The prohibition against the assignment women to duty on any Navy vessel other than hospital ships and naval transports was modified in 1978 to prohibit only the permanent assignment of women to duty on combat vessels. *Department of Defense Appropriation Authorization Act, 1979*, Public Law 95-485, § 808, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess. (October 20, 1978), 1623.

<sup>72</sup> U.S. Congress, House of Representatives, *National Defense Authorization Act for Fiscal Year 1994*, 103<sup>rd</sup> Cong., 1<sup>st</sup> sess., July 30, 1993, 103 H. Rpt. 200, 8, <http://www.lexis.com> (accessed November 15, 2009).

<sup>73</sup> *National Defense Act for Fiscal Year 1994*, § 542, 91. Congress required the Secretary of Defense to provide the House and Senate Armed Services Committees at least 90 days notice of any change to the ground combat exclusion policies of the Department of Defense or the military departments that would: (1) close any category of unit or position to women that was open to them on January 1, 1993; or (2) open any category of unit or position to women that was closed to them on January 1, 1993. In addition, Congress required the Secretary of Defense to provide at least 30 days notice of any other personnel policy change that would open any type of combat unit or combat platform, or any class of combat vessel, to women that was previously closed to them. Ibid.

<sup>74</sup> Ibid., § 543, 91-92.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> U.S. Congress, House of Representatives, *National Defense Authorization Act for Fiscal Year 2006 Report*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., May 20, 2005, 109 H. Rpt. 89, 162, <http://www.lexis.com> (accessed November 15, 2009).

<sup>79</sup> Twenty-four members of the House Armed Services Committee submitted “additional views” opposing the draft legislation. These “additional views” noted that the Secretary of the Army and the Vice Chief of Staff of the Army had both written to the committee to voice their opposition, and they concluded that:

The bottom line is that women have a long and distinguished record of military service to the country. Changes to their current role should be undertaken only after full analysis and careful deliberation. Process concerns aside, the language in this bill is nothing more than a clever attempt to roll back the current role of women in our military. We are concerned that confusion and uncertainty will be created within the ranks of our military during a time of war, battlefield operations may suffer, recruiting and retention may be made more difficult, and service members' lives may even be put at risk. The committee should be affirming the nation's commitment to and admiration of the quality, fidelity, and dedication of all our service members. It is troubling and sad that the majority has pursued such a misguided course.

*Ibid.*, 249-251. See also Representative Ike Skelton, “Providing for Consideration of H.R. 1815, National Defense Authorization Act for Fiscal Year 2006, *Congressional Record* (May 25, 2005): H3903 (placing a letter from the Director of the Army Staff, Lieutenant General James L. Campbell, into the record, which stated that the proposed amendment would close 21,925 positions to women).

<sup>80</sup> David Moniz and Andrea Stone, “Republicans Replace Women-in-Combat Plan,” *USA Today*, May 18, 2005, [http://www.usatoday.com/news/washington/2005-05-18-women-combat\\_x.htm](http://www.usatoday.com/news/washington/2005-05-18-women-combat_x.htm) (accessed November 15, 2009). The FY06 NDAA did make two significant changes to the previous Congressional notification requirements for changes to the ground combat exclusion policy. First, the FY06 NDAA decreased the notification period for changes to the current policies from 90 to 30 days, provided Congress was in continuous session. *National Defense Act for Fiscal Year 2006*, § 541, 96-97. In addition, the FY06 NDAA expanded the type of changes that would trigger the notification requirement to include changes that would open or close military career designators to women, which the statute defined as:

[O]ne that is related to military operations on the ground as of May 18, 2005, and applies--

(A) for enlisted members and warrant officers, to military occupational specialties, specialty codes, enlisted designators, enlisted classification codes, additional skill identifiers, and special qualification identifiers; and

(B) for officers (other than warrant officers), to officer areas of concentration, occupational specialties, specialty codes, designators, additional skill identifiers, and special qualification identifiers.

*Ibid.*

<sup>81</sup> U.S. Secretary of Defense Frank C. Carlucci, “Women in the Military.”

<sup>82</sup> Secretary of Defense Les Aspin, “Policy on the Assignment of Women in the Armed Forces.” memorandum for the Secretaries of the Military Departments, the Chairman, Joint Chiefs of Staff, the Assistant Secretary of Defense (Personnel and Readiness), and the Assistant Secretary of Defense (Reserve Affairs), Washington, D.C., April 28, 1993.

<sup>83</sup> Ibid. In response to Secretary of Defense’s memorandum, the Secretary of the Army and the Chief of Staff of the Army concluded that the Army could open “significantly more positions to female soldiers,” and noted that “[e]xpanding professional roles for women in the Army not only mirrors changes in our society—but more importantly it reflects changes in the conduct of war, which has evolved from a contest of strength of individual combatants, to a contest in which a far wider variety of skills contribute to victory.” Secretary of Army Togo D. West, Jr., “Increasing Opportunities for Women in the Army,” memorandum for the Under Secretary of Defense (Personnel and Readiness), Washington, D.C., July 27, 1994. In addition, the Secretary of Army the noted that “[t]he nature of the modern battlefield is such that we can expect soldiers throughout the breadth and depth of a theater of war to be potentially in combat.” Ibid.

<sup>84</sup> Secretary of Defense Les Aspin, “Policy on the Assignment of Women in the Armed Forces.”

<sup>85</sup> Ibid.

<sup>86</sup> Secretary of Defense Les Aspin, “Direct Ground Combat Definition and Assignment Rule.”

<sup>87</sup> Ibid. The memorandum defined the term “direct ground combat” as:

[E]ngaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.

Ibid.

<sup>88</sup> Ibid. The policy permits the Services to impose further restrictions on the assignment of women:

- where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive;
- where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women;
- where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and

- where job related physical requirements would necessarily exclude the vast majority of women Service members.

Ibid.

<sup>89</sup> The Air Force does not appear to have a separate policy regarding the assignment of women.

<sup>90</sup> AR 600-13, 1. The regulation defines the terms “collocation” and “direct combat” as follows:

#### Collocation

Occurs when the position or unit routinely physically locates and remains with a military unit assigned a doctrinal mission to routinely engage in direct combat. Specifically, positions in units or sub-units which routinely collocate with units assigned a direct combat mission are closed to women. An entire unit will not be closed because a subunit routinely collocates with a unit assigned a direct combat mission. The sub-unit will be closed to women.

#### Direct Combat

Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy's assault by fire, close combat, or counterattack.

Ibid., 5. Note that the Army's definition of direct combat is broader than the Department of Defense's definition in that it includes both the risk of capture and the repulsion of an enemy assault. In addition, the Army policy prohibits the assignment of women to units whose ***routine*** mission is to engage in direct ground combat, while the Department of Defense policy prohibits the assignment of women to units whose ***primary*** mission is to engage in direct ground combat.

<sup>91</sup> Ibid., 2.

<sup>92</sup> U.S. Department of the Navy, *Assignment of Women in the Department of the Navy*, SECNAV Instruction 1300.12C, Change 1 (Washington, D.C.: U.S. Department of the Navy, May 14, 2009), 1. The Navy has implemented SECNAV Instruction 1300.12 in OPNAV Instruction 1300.17A. U.S. Department of the Navy, Office of the Chief of Naval Operations, *Assignment of Women in the Navy*, OPNAV Instruction 1300.17A (Washington, D.C.: U.S. Department of the Navy, Office of the Chief of Naval Operations, January 30, 2007). The Marine Corps has not expressly implemented SECNAV Instruction 1300.12; however, it has implemented the current Department of Defense policy in Marine Corps Order (MCO) P1300.8R. U.S. Department of the Navy, Headquarters, United States Marine Corps, *Marine Corps Personnel Assignment Policy*, Marine Corps Order P1300.8R, Changes 1-8 (Washington, D.C.: U.S. Department of the Navy, Headquarters, United States Marine Corps, October 4, 1994), 5-1 to 5-7.



<sup>93</sup> SECNAV Instruction 1300.12C, Change 1, 3.

<sup>94</sup> Ibid.

<sup>95</sup> The Department of Defense is in the process of lifting the prohibition against the assignment of women to submarines. See David Kerley and Luis Martinez, "Exclusive: Navy to Lift Ban on Women Serving Aboard Submarines," February 23, 2010, <http://abcnews.go.com/Politics/navy-end-ban-women-serving-aboard-submarines-congress/story?id=9921378> (accessed March 15, 2010).

<sup>96</sup> SECNAV Instruction 1300.12C, Change 1, 3-4. The instruction prohibits the assignment of all women to several specific positions (*i.e.*, Special Operations Basic Combatant Swimmer (NEC); SEAL Delivery Vehicle (SDV) Pilot/Navigator/Dry Deck Shelter Operator (NEC 5323); Special Warfare Operator (NEC 5326); Naval Special Warfare Hospital Corpsman (NEC 5392); Special Warfare Combat Craft Crewman (SWCC) (NECs 5350 and 5352)), as well as the assignment of female officers to designators 113X, 615X, 715x, or 717x, or to the position of Special Boat Detachment Officer. Ibid.

<sup>97</sup> Margaret C. Harrell et al., *Assessing the Assignment Policy for Army Women* (Santa Monica, CA: Rand Corporation, 2007). This study was sponsored by the Under Secretary of Defense for Personnel and Readiness in response to the requirement in the FY06 NDAA to submit a report regarding the current and future implementation of the Department of Defense's assignment policy for women. Ibid., iii.

<sup>98</sup> Ibid., xiv, 13-19.

<sup>99</sup> Ibid., xiv-xv, 19-27.

<sup>100</sup> Ibid., xv, 30-32, 45. The study found that:

[T]here are circumstances in which support units with women are in a relationship with maneuver units that is only very slightly different from being assigned, and that, in some circumstances, they have a closer relationship with the maneuver unit than with the unit in their assigned chain of command. Although these assignments meet the "letter" of the assignment policy, the assignments may involve activities or interactions that framers of the policy sought to rule out and that today's policymakers may or may not still want to rule out.

Ibid., 32.

<sup>101</sup> Ibid., xvi, 32-41, 45-46.

<sup>102</sup> Ibid., xvi-xvii, 41-44, 46.

<sup>103</sup> Ibid., xvii-xx, 47-61.

<sup>104</sup> Ibid., xx-xxi, 68-70. The authors noted that "at least some personnel believe that there should not be an assignment policy, meaning simply that all positions should be gender-neutral," but they then conceded that this view was not unanimous. Ibid., 68.

<sup>105</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>106</sup> The Equal Protection Clause of the Fourteenth Amendment states that: “No state shall make or enforce any law which shall...deny to any person within its jurisdiction equal protection of the laws.” U.S. Constitution, amend. XIV, sec. 1.

<sup>107</sup> See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (noting that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,” and stating that “discrimination may be so unjustifiable as to be violative of due process”). The Due Process Clause of the Fifth Amendment states that: “No person shall be...deprived of life, liberty, or property without due process of law.” U.S. Constitution, amend. V.

<sup>108</sup> See, e.g., *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) (noting that a “classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike”).

<sup>109</sup> See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466-467 (1948) (reversed in *Craig v. Boren*, 429 U.S. 190, 210) (holding that a Michigan statute that prohibited women from obtaining bartending licenses unless they were the wife or daughter of the male owner of a licensed liquor establishment did not violate the equal protection clause of the Fourteenth Amendment when the line drawn by the state legislature was “not without a basis in reason”).

<sup>110</sup> *Reed v. Reed*, 404 U.S. 71 (1971). *Reed v. Reed* was the first decision to hold that gender-based discrimination violates the Equal Protection Clause of the Fourteenth Amendment. Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992) 713.

<sup>111</sup> *Reed v. Reed*, 76. The statute at issue in *Reed v. Reed* stated, in part, that: “[o]f several persons claiming and equally entitled...to administer, males must be preferred to females, and relatives of the whole to those of the [half] blood.” *Ibid.* at 73.

<sup>112</sup> *Ibid.*, 76-77. In explaining its rationale, the Court stated that:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

*Ibid.*

<sup>113</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973). Justice Brennan noted that the Court’s “departure from ‘traditional’ rational-basis analysis with respect to sex-based classifications is clearly justified.” Justice Brennan then stated that:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an

attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage....

\* \* \* \* \*

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes....

Ibid., 684-685.

<sup>114</sup> Ibid., 688. The statutes at issue in *Frontiero v. Richardson* permitted servicemen to claim their wives as dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, regardless of whether their wives were actually dependent upon them for any part of their support. In contrast, the statutes only permitted servicewomen to claim their husbands as dependents if their husbands were, in fact, dependent upon them for over one-half of their support. Ibid., 678.

<sup>115</sup> Ibid., 677. Justice Brennan authored the plurality opinion of the Court, in which Justices Douglas, White and Marshall joined; Justice Powell authored the concurring opinion, in which Justices Burger and Blackmun joined; Justice Stewart filed a statement concurring in the judgment; and Justice Rehnquist filed a dissenting statement.

<sup>116</sup> Ibid., 688. Under strict judicial scrutiny, a court will only uphold a statute if it determines that the statute is necessary to achieve a compelling government interest. In commenting on why strict judicial scrutiny was the appropriate standard of review for gender-based classifications, Justice Brennan stated that:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility...." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1407, 31 L.Ed. 2d 768 (1972). And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Ibid.

<sup>117</sup> Ibid., 691.

<sup>118</sup> Ibid.

<sup>119</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>120</sup> Ibid., 197. In *Craig v. Boren*, the Court held that an Oklahoma statute that prohibited the sale of “nonintoxicating” 3.2% beer to males under the age of 21 and to females under the age of 18 denied equal protection of the laws to males between the ages of 18 and 21 in violation of the Equal Protection Clause of the Fourteenth Amendment. Ibid., 210.

<sup>121</sup> *Owens v. Brown*, 455 F.Supp. 291 (D.D.C. 1978).

<sup>122</sup> Ibid., 294. Interestingly, the Navy had already proposed an amendment to 10 U.S.C. § 6015 before the District Court decided this case that would have made it possible to assign women to non-combat vessels. As a result, the Navy was placed in the awkward position of defending a statute that it was trying the change. Ibid., 298-299.

<sup>123</sup> Ibid., 309. The Court also stated that, because the statute “operates to bar an entire sex from a wide, though by no means unlimited, range of career and service opportunities for which the highest military authorities have determined them to be qualified, the sweep of the statute is too broad to pass muster.” Ibid., 308.

<sup>124</sup> Ibid., 306. The Court noted that the legislative history of the statute suggested that the prohibition against permitting the assignment of women on Navy ships was based upon the notion that “duty at sea is part of an essentially masculine tradition,” rather than the demands of military preparedness or combat effectiveness. Ibid.

<sup>125</sup> Ibid., 308-309.

<sup>126</sup> *United States v. Virginia*, 534.

<sup>127</sup> Ibid., 533. The fact that Justice Ginsburg ultimately relied upon the fact that Virginia had shown no “exceedingly persuasive justification” for excluding women from VMI, rather than the standard phraseology associated with the intermediate scrutiny, has fueled speculation that the Court has imposed a new standard for gender-based classifications. See Steven A. Delchin, “United States v. Virginia and Our Evolving ‘Constitution:’ Playing Peek-a-boo With the Standard of Scrutiny for Sex-Based Classifications,” *Case Western Reserve Law Review* 47, Spring (1997), 1130, <http://www.lexis.com> (accessed October 23, 2009).

<sup>128</sup> *United States v. Virginia*, 542-543.

<sup>129</sup> Ibid., 534.

<sup>130</sup> Ibid., 550.

<sup>131</sup> The GAO listed several “concerns” in its 1993 report, to include concerns regarding the ability of women to perform all of the tasks associated with a hostile deployment or combat assignment because of their lack of physical strength; concerns that women cannot endure the harshness of a hostile deployment; concerns that introducing women into an all-male unit would interfere with or destroy unit cohesion; and concerns that women would be unavailable for deployment because of pregnancy. U.S. General Accounting Office, *Women in the Military: Deployment in the Persian Gulf War*, 11. Additionally, the GAO noted in its 1998 report that:

DOD’s current rationale for excluding women from direct ground combat units or occupations is similar to its rationale when it first formalized the combat exclusion

policy in 1994. At that time, DOD officials did not consider changing its long-standing policy because they believed that the integration of women into direct ground combat units lacked both congressional and public support. Furthermore, transcripts of a 1994 press briefing indicate that DOD officials believed that the assignment of women to direct ground combat units “would not contribute to the readiness and effectiveness of those units” because of physical strength, stamina, and privacy issues. At the time of our review, DOD had no plans to reconsider the ground combat exclusion because in its view, (1) there is no military need for women in ground combat positions because an adequate number of men are available, (2) the idea of women in direct ground combat continues to lack congressional and public support, and (3) most servicewomen do not support the involuntary assignment of women to direct ground combat units.

U.S. General Accounting Office, *Gender Issues: Information on DoD’s Assignment Policy and Direct Ground Combat Definition*, 4.

<sup>132</sup> Virginia v. United States, 533.

<sup>133</sup> U.S. Training and Doctrine Command, *IET Soldier’s Handbook*, TRADOC Pamphlet 600-4 (Fort Monroe, VA: U.S. Training and Doctrine Command, December 23, 2008), 184-195.

<sup>134</sup> U.S. General Accounting Office, *Women in the Military: Deployment in the Persian Gulf War*, 4, 38-46; Margaret C. Harrell and Laura Miller, “New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale,” xviii, 53-67.

<sup>135</sup> U.S. General Accounting Office, *Women in the Military: Deployment in the Persian Gulf War*, 4, 47-53; Margaret C. Harrell and Laura Miller, “New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale,” xvii-xviii, 53-67.

<sup>136</sup> A December 2001 CNN/*USA Today*/Gallup poll indicated that 52% of the respondents favored allowing women to serve as ground combat troops. Lydia Saad, “Drafting Women Remains Controversial,” January 4, 2002, <http://www.gallup.com/poll/5152/Drafting-Women-Remains-Controversial.aspx> (accessed January 24, 2010). A 2003 Gallup poll indicated that 45% of the respondents thought women should receive combat assignments if they volunteered for them, and 38% of the respondents thought women should receive combat assignments on the same terms as men. Darren K. Carlson, “Public OK With Gays, Women in Military,” December 23, 2003, <http://www.gallup.com/poll/10240/Public-Gays-Women-Military.aspx> (accessed January 24, 2010). A 2005 CNN/*USA Today*/Gallup poll indicated that only 44% of the respondents favored women “serving as ground troops who are doing most of the fighting,” but the results varied dramatically by age, with 60% of 18- to 29-year-olds favoring the idea; 50% of 30- to 49-year-olds favoring of the idea; 36% of 50- to 64-year-olds favoring the idea; and only 33% of people older than 65 favoring of the idea. Darren K. Carlson, “Do Americans Give Women a Fighting Chance?” June 14, 2005, <http://www.gallup.com/poll/16810/Americans-Give-Women-Fighting-Chance.aspx> (accessed January 24, 2010). Finally, a 2009 CBS News/New York Times poll indicated that 53% of the respondents favored allowing women to join combat units. “Poll: 53% Support Women in Combat Roles,” CBS News, August 15, 2009, <http://www.cbsnews.com/stories/2009/08/15/opinion/polls/main5244312.shtml> (accessed November 15, 2009).

<sup>137</sup> United States v. Virginia, 533.

<sup>138</sup> U.S. Constitution, art. 1, sec. 8.

<sup>139</sup> U.S. Constitution, art. 2, sec. 2.

<sup>140</sup> See, e.g., Parker v. Levy, 417 U.S. 733, 743 (1974) (stating that “the military is, by necessity, a specialized society separate from civilian society”); Schlesinger v. Ballard, 419 U.S. 498, 510 (1974) (stating that “[t]he responsibility for determining how best our Armed Forces shall attend to [the] business [of fighting or being ready to fight wars] rests with Congress).

<sup>141</sup> Rostker v. Goldberg, 453 U.S. 57 (1981). In considering whether the Military Selective Service Act (MSSA) violated the equal protection component of the Fifth Amendment, the Court concluded that “Congress acted well within its constitutional authority when it authorized the registration of men, and not women.” Ibid., 83. In so doing, the Court relied on the fact that women were not eligible for combat without questioning the constitutionality of the combat restrictions themselves. Ibid., 77-83.

<sup>142</sup> Ibid., 65.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid., 67-68.

<sup>145</sup> Ibid., 70.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid., 69. The Court did not think that “the substantive guarantee of due process or certainty in the law will be advanced by any further ‘refinement’ in the applicable tests as suggested by the Government.” Ibid.

<sup>148</sup> David Moniz and Andrea Stone, “Republicans Replace Women-in-Combat Plan.”

<sup>149</sup> Dan De Luce, “Wars Force US Military to Review Ban on Women in Combat,” February 28, 2010, <http://news.yahoo.com/s/afp/usmilitarywomenafghanistaniraq> (accessed March 1, 2010).

<sup>150</sup> Ibid.

<sup>151</sup> Margaret C. Harrell et al., *Assessing the Assignment Policy for Army Women*, 27-28.

<sup>152</sup> Ibid., 45.

<sup>153</sup> Ibid., 45-46. Whether the assignment of women to support units that routinely engage in self-defense activities violates the Army’s prohibition against women participating in “direct combat” depends upon how one defines the phrase “repelling the enemy’s assault.” Ibid. Similarly, whether the assignment of women to support units that interact directly with and in close proximity to maneuver units violates the Army’s prohibition against women collocating routinely with units that are assigned a direct combat mission depends upon how one defines

the term “collocate.” Ibid. In response to the FY06 NDAA, the Secretary of Defense reported that “it has been determined that Army modularization efforts and associated assignment policies, and assignment policies of the Departments of Navy and Air Force comply with the 1994 DoD Policy.” U.S. Secretary of Defense Robert M. Gates, letters for the Chairmen of the House and Senate Committees on Armed Services, Washington, DC, July 30, 2007. However, in a 2006 survey of the U.S. Army War College Class of 2006, 53% of the respondents perceived that the prohibition against females collocating with direct combat units was “rarely enforced or not enforced at all.” Michele M. Putko and Douglas V. Johnson II, eds, “Women in Combat Compendium,” January 2008, 1, <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=830> (accessed October 18, 2009).

<sup>154</sup> The authors of the Rand Corporation assessment noted that personnel who had recently returned from Iraq used these terms to describe the Army assignment policy; however, they conceded that the individuals describing the policy may have been interpreting the policy too restrictively. Margaret C. Harrell et al., *Assessing the Assignment Policy for Army Women*, 49-50. More recently, a survey of U.S. Army War College students indicated that 70 percent of the respondents strongly agreed or agreed that “the regulation prohibiting collocation of female soldiers with direct combat units should be revised;” 59 percent of the respondents strongly agreed or agreed that “the regulation prohibiting female soldiers from serving in battalion sized or smaller units assigned a mission to direct combat units should be revised;” and 74 percent of the respondents strongly agreed or agreed that “all soldiers should be assigned to positions for which they are qualified, regardless of their gender.” Putko and Johnson, “Women in Combat Compendium,” 1-2. In addition, 63 percent of the respondents disagreed or strongly disagreed that “female soldiers should NOT be assigned to direct combat units due to lack of physical strength;” 59 percent of the respondents disagreed or strongly disagreed that “female soldiers should NOT be assigned to combat units due to a lack of co-ed life support facilities;” 57 percent of respondents disagreed or strongly disagreed that “female soldiers should NOT be assigned to direct combat units due to a perceived lack of public support;” 59 percent of the respondents disagreed or strongly disagreed that “female soldiers should NOT be assigned to direct combat units due to potential problems in assimilation/unit bonding;” and 78 percent of the respondents disagreed or strongly disagreed that “female soldiers should not be assigned to direct combat units to preclude exposure to trauma associated with combat.” Ibid.

<sup>155</sup> A former battalion commander in Iraq indicated that his best combat interrogator and best tank mechanic were both women; however, getting them “in the unit” required “a little paperwork sleight of hand” because “the rules formally barred them from that role.” Dan De Luce, “Wars Force US Military to Review Ban on Women in Combat.” See also Putko and Johnson, “Women in Combat Compendium,” 1.

<sup>156</sup> W. Warner Burke, *Organization Change: Theory and Practice* (Thousand Oaks, CA: Sage Publications Inc., 2002), 275, 280.

<sup>157</sup> Stephen J. Gerras et. al., *Organizational Culture: Applying a Hybrid Model to the U.S. Army* (Carlisle: U.S. Army War College, 2008), 17-20.

<sup>158</sup> Ibid.

<sup>159</sup> Burke, *Organization Change: Theory and Practice*, 274.